

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SCOTT AND KATHRYN KASEBURG, et al.,)

Plaintiffs,)

vs.)

PORT OF SEATTLE, a municipal corporation;)
PUGET SOUND ENERGY, INC., a Washington)
for profit corporation and KING COUNTY, a)
home rule charter county, and CENTRAL PUGET)
SOUND REGIONAL TRANSIT AUTHORITY, a)
municipal corporation,)

Defendants.)

No. 14-cv-00784-JCC

DECLARATION OF CHRISTIE TRUE

NOTE ON MOTION CALENDAR:
February 20, 2015

I, Christie True, declare and state the following:

1. I am over eighteen years of age. I have personal knowledge of the facts contained in this declaration and am otherwise competent to testify to the matters in this declaration.
2. I am the Director of King County Department of Natural Resources and Parks.
3. King County is the current owner of all property rights formerly held by BNSF in the South Rail Corridor (the "Corridor") segment of the Eastside Rail Corridor at issue in this lawsuit, subject to certain encumbrances as described below. The Eastside Rail Corridor (the "ESRC") is sometimes referred to as the Woodinville Subdivision. The County assumed

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1 responsibility to manage the railbanked portion of the ESRC through Notices of Interim Trail
2 Use issued by the Surface Transportation Board ("STB") and a Trail Use Agreement executed by
3 the BNSF Railway Company ("BNSF") and King County.

4 4. True and correct copies of the three Notices of Interim Trail Use ("NITU") for the
5 ESRC, two dated October 27, 2008, and one dated November 25, 2008, are attached hereto as
6 Exhibits A, B, and C. Exhibit A is the NITU that applies to the Corridor.

7 5. A true and correct copy of the Trail Use Agreement for the ESRC is attached
8 hereto as Exhibit D.

9 6. True and correct copies of the February 4, 2010 letters from BNSF to the STB
10 providing notice that the County and BNSF has entered into a Trail Use Agreement are attached
11 hereto as Exhibits E, F, and G, respectively. Exhibit E is the letter that relates to the Corridor.

12 7. A true and correct copy of a map showing the areas of the Eastside Rail Corridor
13 that are in active freight service and in railbanked status is attached hereto as Exhibit H. The
14 geographic boundaries of the entire ESRC stretch from Renton north to the City of Snohomish,
15 and from Woodinville to the City of Redmond. As depicted on Exhibit H, approximately 14.5
16 miles of the ESRC are in active freight service status (mileposts 23.8 to 38.25 on the main line)
17 and approximately 26 miles of the ESRC are in railbanked status (mileposts 5.0 to 23.8 on the
18 main line and mileposts 0.0 to 7.3 on the Redmond Spur).

19 8. The Parks and Recreation Division of the King County Department of Natural
20 Resources and Parks is presently undertaking trail master-planning for the railbanked portion of
21 the ESRC outside of Kirkland and Redmond. Kirkland and Redmond are undertaking their own
22 trail plans. King County's trail master-plan is expected to be complete in 2016. A true and
23

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1 correct copy of a document illustrating the scope and timing of the County's trail master-
2 planning work is attached hereto as Exhibit I.

3 9. Preservation of the ESRC is a major public project in which several "Regional
4 Partners" have participated, including the Port of Seattle ("Port"), Central Puget Sound Regional
5 Transit Authority ("Sound Transit"), Puget Sound Energy ("PSE") and the Cities of Kirkland and
6 Redmond. A true and correct copy of the Memorandum of Understanding outlining the initial
7 understanding of the roles of these parties is attached hereto as Exhibit J. In Section 3 of the
8 Memorandum of Understanding the parties express their intent to carry out trail, public
9 transportation and utility uses subject to reactivation of the right-of-way for freight rail service.

10 10. In the railbanked portion of the Eastside Rail Corridor the primary goals of King
11 County are to preserve the ESRC from being lost to abandonment so that it may be available if
12 freight service is needed in the future, and to develop a world class trail and provide other
13 substantial and beneficial public transportation and utility services. A true and correct copy of
14 Ordinance 15233, dated July 12, 2005, is attached as Exhibit K. Recital C of Ordinance 15233
15 states that acquiring the ESRC through the federal railbanking program offers the County "a
16 unique opportunity to retain the corridor's continuous, unbroken ownership for potential
17 recreation and transportation use before it is . . . lost forever." A true and correct copy of
18 Ordinance 17503 without attachments, dated December 11, 2012, is attached hereto as Exhibit L.
19 Ordinance 17503 and its attachments may be easily retrieved online through the Legislation
20 search page of the Metropolitan King County Council at
21 <http://www.kingcounty.gov/council/legislation.aspx>. In Exhibit L attached hereto, Recital C of
22 Ordinance 17503 states that the ESRC is comprised of "a contiguous set of parcels that together
23 offer unique and significant opportunities that would be impossible to recreate if the parcels were

1 disaggregated and sold off to private interests.” Recital S of Ordinance 17503 states in part that
2 maintaining the ESRC in contiguous public ownership offers a “once-in-a-lifetime” opportunity
3 to expand the County’s regional trail system, to encourage vibrant, prosperous and sustainable
4 communities, and to safeguard and enhance King County’s natural resources and environment.

5 11. The County and the other Regional Partners have relied on the legal effect of
6 railbanking under 16 U.S.C. 1247(d) and its implementing regulations at 49 C.F.R. Part 1152 to
7 protect and preserve the railroad easements that BNSF owned in the ESRC and which, but for
8 railbanking, would have been lost through reversion when BNSF ended freight service.
9 Moreover, the continuation of the railroad easements conveyed by BNSF to the Port and then
10 from the Port to the County, is necessary in order to allow the County to develop a trail and
11 manage the ESRC as required by the National Trails System Act Amendments of 1983, and to
12 allow the other public transportation and utility uses envisioned by the Regional Partners. By
13 way of example, Section 8.1(c) of the Donation Agreement for the Woodinville Subdivision
14 (South Rail Line) between BNSF Railway Company, the Port of Seattle and King County, dated
15 May 12, 2008 and the Purchase and Sale Agreement for the Woodinville Subdivision (North Rail
16 Line) between BNSF Railway Company, the Port of Seattle and King County, dated May 12,
17 2008, true and correct copies of which are attached as Exhibits M and N, state that BNSF’s sale
18 of the North Rail Line and its donation of the South Rail Line to the Port were contingent on
19 STB approval of railbanking for a portion of the North Rail Line and all of the South Rail Line
20 portion of the ESRC. Similarly, sections 3.2 to 3.4 of the 2009 Memorandum of Understanding
21 attached as Exhibit J state that railbanking will be established on the Southern Portion of the
22 Woodinville Subdivision and the Redmond Spur, and that, consistent with railbanking, those
23

1 portions will be available for public transportation use and utility use in addition to public trail
2 use.

3 12. In the active freight section of the Woodinville Subdivision, the primary goal has
4 been to maintain existing interstate freight service from the Woodinville area in King County
5 north through unincorporated King County and Snohomish County to the BNSF main line in the
6 City of Snohomish. A true and correct copy of the "Quit Claim Deed Woodinville North Freight
7 Portion" from BNSF to the Port dated December 18, 2009 is attached hereto as Exhibit O. In the
8 second paragraph on page 1 of that Exhibit O, BNSF excepted and reserved to itself and its
9 successors and assigns an exclusive easement for freight rail purposes. Likewise, section 3.1 of
10 the 2009 Memorandum of Understanding attached as Exhibit J states that freight rail service
11 subject to the jurisdiction of the STB will continue on the Freight Portion.

12 13. In Exhibit N, attached hereto, Section 1 of the Purchase and Sale Agreement
13 defines the Property subject to that agreement as the North Rail Line, which includes a Freight
14 Portion and a Railbanked Portion. Section 1 of the Purchase and Sale Agreement also defines
15 the "South Rail Line," which is the subject of the also defined Donation Agreement, or South
16 Agreement. Section 2 of the Purchase and Sale Agreement requires the County to pay the Port
17 \$1,903,000 at closing, and for the Port to pay BNSF \$106,903,000 at closing. Section 8.2(b) of
18 the Purchase and Sale Agreement conditions the closing of the sale of the North Rail Line on a
19 simultaneous closing of the conveyance of the South Rail Line under the South Agreement.
20 Section 4.4 of the Purchase and Sale Agreement includes a title warranty from BNSF: "BNSF
21 does represent and warrant that BNSF's ownership interest in and to the Property, even subject to
22 the Third Party Leases/Licenses, is sufficient to permit railroad operations on the Property,
23 including passenger railroad operations; and to permit BNSF to convey the Property as

1 contemplated in this Agreement and the Other Agreements.” Section 4.4 of the Purchase and
2 Sale Agreement also says that the Property will be conveyed subject to all matters affecting the
3 property whether of record or not. Section 9.2 of the Purchase and Sale Agreement requires
4 execution of an Assignment at closing. The Assignment is attached as Exhibit E to the Purchase
5 and Sale Agreement and calls for the assignment to and assumption by the Port of the leases and
6 licenses that had previously been granted by BNSF for use of the Property, except for certain
7 Fiber Optic Agreements. These leases and licenses are included in Exhibit F to the Purchase and
8 Sale Agreement. Section 9.2 of the Purchase and Sale Agreement also requires the execution of
9 a Public Multipurpose Easement between the Port and the County at closing.

10 14. In Exhibit M, attached hereto, Section 1 of the Donation Agreement defines the
11 Property subject to that agreement as the South Rail Line. Under Section 1 of the Donation
12 Agreement, and except for one small segment not at issue in this lawsuit, the South Rail Line is
13 comprised of the Railbanked Portion. Plaintiffs in this lawsuit reside along a segment of the
14 South Rail Line. Section 1 also defines the North Rail Line, which is the subject of the Purchase
15 and Sale Agreement or North Agreement. Section 2 of the Donation Agreement requires BNSF
16 to donate the Property to the Port at closing. Section 8.2(b) of the Donation Agreement
17 conditions the closing of the donation on a simultaneous closing of the conveyance of the North
18 Rail Line under the North Agreement. Section 4.4 of the Donation Agreement includes a title
19 warranty from BNSF: “BNSF does represent and warrant that BNSF’s ownership interest in and
20 to the Property, even subject to the Third Party Leases/Licenses, is sufficient to permit railroad
21 operations on the Property, including passenger railroad operations; and to permit BNSF to
22 convey the Property as contemplated in this Agreement and the Other Agreements.” Section 4.4
23 of the Donation Agreement also says that the Property will be conveyed subject to all matters

1 affecting the property whether of record or not. Section 9.2 of the Donation Agreement requires
2 execution of the Assignment at closing. The Assignment is attached as Exhibit E to the
3 Donation Agreement and calls for the assignment to and assumption by the Port of the leases and
4 licenses that had previously been granted by BNSF for use of the Property, except for certain
5 Fiber Optic Agreements. These leases and licenses are included in Exhibit F to the Donation
6 Agreement. Section 9.2 of the Donation Agreement also requires the execution of a Public
7 Multipurpose Easement between the Port and the County at closing.

8 15. True and correct copies of the 7th Amendment to the Purchase and Sale
9 Agreement and the Donation Agreement, each dated December 17, 2009, are attached hereto as
10 Exhibits P and Q, wherein the purchase price in the Purchase and Sale Agreement was adjusted
11 to \$81,449,000.

12 16. A true and correct copy of the "Quit Claim Deed Woodinville North Railbanked
13 Portion" from BNSF to the Port dated December 18, 2009 is attached hereto as Exhibit R.

14 17. A true and correct copy of the "Quit Claim Deed Woodinville South" from BNSF
15 to the Port dated December 18, 2009 is attached hereto as Exhibit S.

16 18. A true and correct copy of the Assignment of Third Party Leases/Licenses and
17 other Contracts from BNSF to the Port dated December 18, 2009 is attached hereto as Exhibit T.

18 19. A true and correct copy of the Public Multipurpose Easement from the Port to
19 King County dated December 18, 2009 (the "Multipurpose Easement") is attached hereto as
20 Exhibit U. Recitals 4 and 6 of the Multipurpose Easement say that the Parties intend to use the
21 ESRC for regional recreational trail and other transportation purposes, and that if interstate
22 freight service is reactivated it should be integrated with the intended regional trail and
23 transportation uses. Section 1 of the Multipurpose Easement grants the County the right to use

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1 the ESRC for a regional trail and to carry out its railbanking obligations. Section 4 of the
 2 Multipurpose Easement requires that the ESRC be made available for reactivated interstate
 3 freight service if required by the STB, and that the parties to cooperate to be fully compensated
 4 for the rights and interests in the ESRC and any improvements of the ESRC.

5 20. A true and correct copy of pages 1, 13, and 20-23 of "Defendant BNSF's
 6 Responses to Plaintiffs' First Set of Interrogatories and Requests for Documents" in Lane, et. al.
 7 v. Port of Seattle, et al., King County Superior Court No. 10-2-25591-5 SEA, are attached here to
 8 as Exhibit V. On page 13 of this document BNSF states that it claimed a deduction of
 9 \$326,161,990 on its federal income tax return for the tax year ending December 31, 2009 with
 10 respect to the disposition of the Southern Portion of the ESRC.

11 21. A true and correct copy of the Purchase and Sale Agreement between the Port and
 12 King County dated February 18, 2013 (the "2013 P&SA") is attached hereto as Exhibit W.
 13 Section 1.1 of the 2013 PS&A defines the "Property" that is the subject of the 2013 P&SA.
 14 Section 2 of the 2013 P&SA states that the purchase price for the Property is \$15,800,000.
 15 Section 9 of the 2013 P&SA says that the County's Public Multipurpose Easement will terminate
 16 through the doctrine of merger as to any land conveyed by the Port to the County under the 2013
 17 P&SA. Section 11.2.4 of the 2013 P&SA requires execution of an assignment of all the "Port's
 18 right, title and interest in and to the Third Party Leases, Licenses or Contracts listed in Schedule
 19 1 to the 2013 P&SA. The form of the assignment is attached as Exhibit E to the 2013 P&SA.
 20 Schedule 1 is also attached to the 2013 P&SA.

21 22. A true and correct copies of the quit claim deed from the Port to King County
 22 dated February 13, 2013 along the contemporaneously executed Assignment of Third Party
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1 Leases, Licenses and Contracts (without the Schedule 1 list of agreements), are attached hereto
2 as Exhibit X.

3 23. In order to carry out the shared public goals for the railbanked portion of the
4 ESRC, the County joined with other Regional Partners to form the Eastside Rail Corridor
5 Regional Advisory Council ("Advisory Council"). A true and correct copy of the King County
6 Motion establishing the Advisory Council is attached hereto as Exhibit Y.

7 24. The Advisory Council has been meeting regularly over the last two-plus years to
8 coordinate ESRC planning and development, and has issued a document entitled "*Creating*
9 *Connections Recommendations on the Eastside Rail Corridor from the Regional Advisory*
10 *Council.*" A true and correct copy of this document (the "RAC Report") is attached hereto as
11 Exhibit Z. On page 7 of the RAC Report, it states that the ESRC provides a rare and unique
12 opportunity to develop a major north-south corridor for multiple, important purposes: mobility,
13 utility infrastructure, and recreation. On that same page, the RAC Report further states that
14 development of the ESRC will help shape our region for decades. On page 11, the RAC Report
15 states that preservation of the ESRC in public ownership offers an unparalleled opportunity,
16 consistent with the federal Rails-to-Trails Act, to serve this quickly growing region with trail,
17 high-capacity transit, and utility connections. On page 12, the RAC Report states that planning
18 will be carried out carefully to allow for multiple uses and so as not to preclude future
19 opportunities. On page 18, the RAC Report states that the goal for the ESRC is that it will be a
20 multiuse corridor that would be able to accommodate trail, high-capacity transit, and utility use,
21 as well as freight use if the railbanked portion is ever reactivated for freight. Appendix 5 to the
22 RAC Report (page 85 of Exhibit Z) states that railbanking under 16 U.S.C. §1247(d) preserves
23 disused portions of interstate rail lines by allowing them to be used for trails and other

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1 compatible uses for an indefinite but interim period, and that railbanked property may be
2 restored to active service in appropriate circumstances by a bona fide interstate freight rail
3 operator. On that same page, Appendix 5 to the RAC Report further states that a core duty of an
4 interim trail user is to ensure that sufficient real property interest remain in a railbanked corridor
5 to allow the restoration of freight rail service, and that the various additional uses contemplated
6 for the railbanked segments of the Woodinville Subdivision are compatible with preserving the
7 ESRC for future freight use.

8 25. The County manages the railbanked portion of the ESRC in part by issuing
9 special use permits and other rights to allow third-party uses under King County Code Chapter
10 4.56, Chapter 14.30, and other authorities. King County also regularly inspects, maintains and
11 repairs the full length and width of the ESRC and works with adjacent landowners to remove
12 encroachments. Encroachments are a concern throughout the railbanked portion of the ESRC.

13 26. On or about December 15, 2014, a property owner in the vicinity of the properties
14 owned by the Plaintiffs in this lawsuit used a backhoe, without the permission of the County or
15 regulatory permits, to remove a bulkhead and dig into the Corridor, disturbing the rail bed and
16 potentially undermining the stability of it. Representatives of the King County Parks Division
17 and the King County Department of Permitting and Environmental Review directed the property
18 owner to stop. True and correct copies of photographs of this work are attached hereto as
19 Exhibit AA. This incident demonstrates the importance of the County being able to control all
20 interim uses of and alterations to the railbanked portion of the ESRC, including the Corridor at
21 issue in this lawsuit.

22 27. The County owns a major wastewater sewer trunk line, known as the Eastside
23 Interceptor, that serves the greater east side, including Kirkland, Redmond, Issaquah, Lake Hills,

1 Bellevue, and Newcastle. It carries sewage from these communities south to King County's
2 treatment plant in Renton. The Eastside Interceptor extends in a linear fashion through portions
3 of the ESRC. The Interceptor was initially installed between 1961 and 1964, and the County
4 obtained easements and permits from BNSF for the Interceptor in that same time frame.
5

6 I declare under penalty of perjury of the laws of the United States and the State of
7 Washington that, to the best of my knowledge, the foregoing is true and correct.

8 Signed this 2nd day of February, 2015 at Seattle, Washington.

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11 Christie True
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DECLARATION OF CHRISTIE TRUE
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